IN THE

Supreme Court of the United States

October Term, 1950.

No. 518.

THE MONTANA POWER COMPANY, a corporation, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

On Petition For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

PETITIONER'S REPLY BRIEF TO BRIEF IN OPPOSITION

The Commission's Brief in Opposition[1] does not question the Company's statement of the Questions Presented nor the accuracy of the facts set forth in the Petition. Neither does it add any material facts to those stated in the Petition.

The Petition discusses the opinion below as to which review by this Court is sought. The Brief in Opposition, so

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[1] Designated (Br. Op. ·).

far as the facts are concerned, merely summarizes the Commission's findings. In this brief we shall cover only the more important matters as to which statements in the Brief in Opposition require a reply.

NAVIGABLE WATERS.

The statement on page 11 of the Brief in Opposition that the Commission found ". . . that relatively little improvement would be required to obtain an unobstructed 2.5 foot channel permitting light-draft navigation from Fort Benton to Belt Creek below the falls. . . .", is incorrect. The Commission did not so find. Had it done so the finding would have been contrary to the undisputed evidence. The Chief of Engineers at all times reported that the entire forty-nine (49) mile reach from Fort Benton to the mouth of Sun River was unnavigable and not susceptible of improvement, that no work was ever done on it and no work ever projected for it (R. 557, 558, 588).

Ex. 17B, 1891, pp. 275, 2232.
Ex. 17B, 1893, p. 2297.
Ex. 17B, 1894, p. 270.
Ex. 17B, 1895, pp. 301, 2215.
Ex. 17B, 1896, pp. 260, 1867.
Ex. 17B, 1897, pp. 334, 2179.
Ex. 17B, 1898, p. 323.
Ex. 17B, 1899, p. 385.
Ex. 17B, 1900, p. 444.
Ex. 17C, 1915, p. 1896.
Ex. 17C, 1920, p. 1250.

There is no contrary evidence.

While the Brief in Opposition refers to portages made around the falls with smaller craft (Br. Op. 7, 23), the only instances mentioned are the Lewis and Clark expedition[2],

[2] The fact that Lewis and Clark took canoes over a stretch of water is not evidence that it is navigable. They dragged their canoes to a point in the Beaverhead River one hundred (100) miles above Three Forks (Pet. 12). The Beaverhead River is a tributary of the Jefferson River. Both are unnavigable (R. 985-987).

the trip downstream by Roberts in a skiff, and possible use by miners.

The Commission makes no effort to dispute the Company's statement regarding the lack of substantiating evidence as to the trips by miners[3] (Pet. 13, 14). On the whole record, considering the contemporary reports of the Chief of Engineers and the Roberts report in 1872 (Pet. 14), the findings of the Commission and the Court below as to the transportation of miners are not supported by substantial evidence.

Any question as to the duty of reviewing courts to scrutinize the substantiality of the evidence to support findings of the Commission was removed by the decision of this Court in *Universal Camera Corporation* v. *National Labor Relations Board,* No. 40, February 26, 1951. The Court there said:

> And so we hold that the standard of proof specifically required of the Labor Board by the Taft-Hartley Act is the same as that to be exacted by courts reviewing every administrative action subject to the Administrative Procedure Act.
>
> Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitively precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is the clear meaning of the reference in both statutes to "the whole record." Committee reports and the adoption in the Administrative Procedure Act of the minority views of the Attorney General's Committee demonstrate that to enjoin such a duty on the reviewing court was one of the

[3] The footnote on page 8 of the Brief in Opposition refers to an 1867 legislative grant of a toll road privilege as supporting evidence. There is no evidence that any such road was ever commenced or even seriously contemplated.

important purposes of the movement which eventuated in that enactment.

In a footnote on Page 18 of the Brief in Opposition, the Commission seeks to justify the admission of newspaper advertisements and similar items. The Montello, 20 Wall. 430, 440-442, is cited as authority for admitting newspaper advertisements. The inference is that this Court approved the admission of a newspaper advertisement as evidence of navigation. This Court actually based the statement on the decision in *Doty* v. *Strong*, 1 Pinney (Wis.) 316. (See footnote, 20 Wall. 442). That case involved a suit for damages for failure of a common carrier to transport goods up the Fox River from Green Bay to Portage. It was proved that defendants were engaged in transporting property up the Fox River and that the advertisement was their advertisement (pp. 317, 324, 325). The advertisement was admitted for the purpose of proving that defendants were common carriers (pp. 324, 325). It is clear that this Court in The Montello did not rely upon a newspaper advertisement as proof that the boats went up the Fox River.

None of the other authorities cited in the footnote deals with the admission of newspaper items over objection. In the instant case, timely and appropriate objection was made to the admission of all such items.

The footnote on page 9 of the Brief in Opposition, referring to the 1901 report of the Chief of Engineers, states that ". . . combining figures for traffic between Great Falls and Cascade with those for traffic between Cascade and Stubbs Ferry shows a total of 2,528 tons of freight and 11,175 passengers carried (p. 2394)."

This footnote does not state the period covered. The report shows that it is a tabulation of freight and passengers carried on the reach between Great Falls and Stubbs Ferry between 1894 and 1900, inclusive.

General Max C. Tyler, USA Retired, formerly Assistant Chief of Engineers, testifying as a witness for the Com-

pany, described the method of compiling such statistics. He stated:

> The custom in reporting commercial statistics was and is to report river traffic by reaches, usually under the headings of 'appropriations.' Traffic which moves any distance on a reach, even if it moved only one mile, is reported under the general heading of the reach; that is, traffic moving anywhere on that part of the river between Stubbs' Ferry and Great Falls was reported under that heading. Traffic moving on any part of the river between Great Falls and Buckshot Island, 16 miles above Great Falls, was reported under the heading "Stubbs' Ferry to Great Falls." Excursion passengers on "The Rose" were also reported in the reach between "Stubbs, Ferry and Great Falls." This does not indicate a movement over more than a portion of the reach. (R. 568, 569).

He also testified that Government freight and passengers were probably included (R. 566, 593). The Government work carried on during that period, together with the traffic on the lower end of the Long Pool and the excursionists carried by the *Rose* near the Gates of the Mountains (Pet. 15), readily account for the figures given. There is no inference from them that any freight or passengers were carried from Great Falls to any point above the Long Pool or from any point above the Long Pool to Great Falls.

On page 12 of the Brief in Opposition, the Commission states that the reports of Army engineers consistently reflected the navigable status of the river ". . . between Fort Benton and Three Forks." This is easily disposed of by the reports themselves. The report of the Chief of Engineers for 1915, p. 1896, (Exhibit 17C, 1915, p. 1896) states,

> (d) Fort Benton to Stubbs Ferry—as far as navigation is concerned the head waters of the Missouri are completely and permanently separated from the river below. Between Fort Benton and Great Falls, 49 miles, the river has a descent of 695 feet, with three sheer falls of 90, 50, and 26 feet, and numerous rapids

> and smaller cascades. Navigation is impossible and the section has never been regarded as susceptible of improvement.

The 1892 report of Captain Powell states:

> Any navigation, which might obtain will necessarily be local. There is no chance for a navigation connection with the river below Fort Benton on account of the insurmountable obstructions in the Great Falls, whose total fall is about 550 feet, and which, with the bad rapids tailing out from the lower fall, extend over some 30 miles or more. (R. 1389)

The statement on page 20 of the Brief in Opposition that the Commission pointed to a War Department plan finally revised in 1898 ". . . for providing a channel of not less than 2.5 feet deep at a cost of $213,646.50, together with an inexpensive narrow-gauge rail link around the falls (*Supra*, p. 11)", is misleading. The Army engineers never proposed such a railway or any other device for bypassing the forty-nine (49) mile reach from Fort Benton to the mouth of Sun River.

Throughout the Brief in Opposition the Commission attempts to divert attention from the impassable and unimprovable forty-nine (49) mile reach just above Fort Benton and to center attention on the limited and purely local use of unrelated sections above the falls. An example is found on page 17 of the Brief in Opposition where the Commission states, "Clearly, even the upper Missouri River is more navigable than portions of the New River involved in the *Appalachian* case." Obviously, this is not so if the forty-nine (49) mile reach from Fort Benton to the mouth of the Sun River is taken into account for, in the New River case, there were many instances of through interstate use by water (311 U. S. 415). It is not even correct as to the Missouri River above the Long Pool for, in the New River case, there were many instances of navigation in both directions, while in this case the only instances of up-stream

travel above the Long Pool were Lewis and Clark and the *Rose*.

The Commission does not question the analysis of the facts in any of the controlling cases as set forth in the footnote at page 23 of the Petition nor does it suggest any other controlling case. Through interstate use by water has existed in every case held to constitute "navigable waters" or navigable waters of the United States. It does not exist here.

CONGRESSIONAL ASSERTION OF JURISDICTION.

Under this heading the Commission on page 12 of the Brief in Opposition refers to surveys and examinations of the river between Fort Benton and Three Forks, to the appropriation of funds for improvements above the falls, and to Acts of Congress authorizing construction of dams at various points with provisions protecting the interests of navigation. None of these factors is any evidence of navigability, much less interstate navigability. These factors were also present in *Oklahoma* v. *Texas*, 258 U. S. 574, but this Court held that no inference of navigability arose from them (pp. 585, 586, 590).

AUTHORITY TO OCCUPY LANDS OF THE UNITED STATES.

The Commission's argument with regard to the permits and rights of way authorizing the occupancy and use of the public lands at Hauser and Hebgen is based entirely upon the assumption that there was a violation of provisions of the permits or applicable regulations of the Secretary of the Interior or the Secretary of Agriculture. If such was the case, the Secretaries have ample authority to take such action as they might deem appropriate. The application of regulations rests solely in the discretion of the Secretary of the Department issuing them. (Pet. p. 27, *Smith* v. *U. S.*, 24 Ct. Cls. 209; *Palmer* v. *U. S.*, 72 Ct. Cls.

401). The Commission's Brief does not mention either of these cases.

The fallacy of the Commission's position is high-lighted by the statement (Br. Op. 31) that,

> To protect the public interest and to insure the proper discharge of these obligations, the departmental Secretaries certainly are free to scrutinize every transfer of these permits regardless how achieved.

The question here involved is not whether the Secretary of the Interior or the Secretary of Agriculture has authority to take any action with regard to these permits issued by them, but whether the Federal Power Commission has such authority.

The Commission places considerable reliance upon the assertion that these permits are personal in nature (Br. Op. 27, 30). This is not correct and is in conflict with the decision of this Court in *Swendig* v. *Washington Water Power Company,* 265 U. S. 322, and the decision in *Washington Water Power Company* v. *Harbaugh,* 253 Federal 681.

Section 23 (a) of the Federal Power Act[4] provides that,

> The provisions of this Part shall not be construed as affecting any permit or valid existing right of way heretofore granted or as confirming or otherwise affecting any claim, or as affecting any authority heretofore given pursuant to law . . . .

The action of the Commission in this case clearly affects the permits and is in violation of this provision of the Act. Nevertheless, the Commission seeks to explain away its action by the statement in footnote 24 (Br. Op. 27) that,

> The Commission's Order does not invalidate the permits but rather merely holds that in the circumstances of this case the Company's possession of these

[4] Quoted at page A 1 of the Appendix to the Petition for Certiorari.

> permits does not operate to exempt these projects now operated by it, rather than by the original permittees, from the licensing requirements of the Act.

This is simply double-talk. If the permits issued by the Secretary of Agriculture and the Secretary of the Interior prior to 1920 are recognized by the respective Secretaries, the Fedral Power Commission has no authority to require a license. This is the conflict which this Court is called upon to resolve. This question is of vital importance in the administration of the Federal Power Act and of the Act of February 15, 1901.

CONCLUSION.

For the reasons stated in the Petition for a Writ of Certiorari it should be granted.

Respectfully submitted,

R. H. Glover,
J. E. Corette, Jr.,
S. B. Chase, Jr.,
John C. Hauck,
608-616 Hennessy Building,
Butte, Montana.

Herbert M. Bingham,
H. Donald Kistler,
921 Tower Building,
Washington, D. C.,
Attorneys for Petitioner,
The Montana Power Company.

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